

*Before the*  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	MB Docket 07-269
Competition in the Market for the Delivery	)	
Of Video Programming	)	
	)	

**WRITTEN EX PARTE SUBMISSION OF WEALTHTV**

WealthTV respectfully submits this written ex parte presentation in connection with the Commission's inquiry seeking comment regarding the Commission's annual report on the status of competition in the MVPD market.<sup>1</sup>

WealthTV urges the Commission to acknowledge that the current environment of the cable industry does not promote a "level playing field" for unaffiliated programming entrants with respect to access to carriage by cable companies. This is because programmers affiliated with the cable Multiple Systems Operators ("MSOs") are afforded considerable structural advantages that are at odds with the law and the Commission's regulations prohibiting discrimination on the basis of affiliation or nonaffiliation. To address this reality, over the last few years, numerous independent programming services, including WealthTV, have met with members of the Commission to urge the Commission to address much needed changes to the carriage access complaint process specified in the Commission's regulations. *See* 47 C.F.R. §§ 76.1300 – 76.1302 (2008).

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<sup>1</sup> *See* Supplemental Notice of Inquiry, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 FCC Rcd 4401 (2009); Notice of Inquiry, *Annual Assessment of the Status of Competition in the Delivery of Video Programming*, 24 FCC Rcd 750 (2009).

WealthTV urges the Commission to revive and complete the proceeding begun in MB Docket 07-42 and add further substance and meaning to the current regulations by implementing the following reforms:

1. Establishing a specific “no later than” time frame for when the Media Bureau on delegated authority from the Commission will determine whether the complainant has made out a *prima facie* case, and an additional deadline for the Commission to issue a final order resolving the complaint. With respect to the handful of complaints that have been filed under the Commission’s regulations, complainants have waited for an excessive amount of time, in some cases exceeding one year, before the issuance of the *in limine* ruling as to whether the complainant met the burden of establishing a *prima facie* case. The absence of concrete and expeditious time tables makes the regulations ineffective and not a viable remedy due to the excessive time delays and associated costs with the lengthy process, in effect rendering the regulations meaningless, and arguably promoting the practice that the regulation was designed to prevent.

2. Specifically defining the criteria for establishing a “*prima facie* case”.

WealthTV has previously advocated the adoption of a standard akin to the standard applied in federal courts to assess whether a complaint can survive a motion to dismiss and renews that suggestion here.

3. Explicitly adopting findings by the Media Bureau<sup>2</sup> that complaints brought under Section 616 and the Commission’s program carriage regulations are governed by a “burden-shifting” framework. Pursuant to this framework, plaintiff bears the burden of making out a *prima facie* case of discrimination, at which point the burden shifts to the

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<sup>2</sup> Order on Review, *TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, DA 08-2441 (MB rel. Oc. 30, 2008).

defendant to prove that the disparate treatment was based on other, non-discriminatory considerations.

4. Clarifying the existing regulations to prohibit retaliation by a cable company against a programmer for filing a pre-filing complaint notice or a complaint. Unaffiliated programmers have no effective recourse to the remedies specified in the regulations so long as cable companies are able to penalize them for asserting their statutory rights. For example, the Executive Vice President and Chief Programming Officer for Time Warner Cable, Melinda C. Witmer, stated that once an independent programmer decided to seek recourse via the FCC regulatory process, it was not Time Warner Cable's preference to enter into a carriage access relationship with the programmer.<sup>3</sup> Furthermore, experience has shown that once a complaint is filed, other non-party cable MSOs will retaliate by refusing to give any consideration to the programmer seeking relief via the carriage access complaint process.

5. Defining what standards shall be applied and what constitutes "discrimination in video programming distribution". In connection with recent adjudications, the cable MSOs have asserted the applicability of unreasonably high standards for finding discrimination that do not comport with the statute or Congressional intent.

6. Defining the term "unreasonably restrain" as used in 47 C.F.R. § 76.1301(c). The Enforcement Bureau has commented in recent administrative litigations that discrimination that "reasonably" restrains the ability of a programmer to compete fairly may not be unlawful. Ironically, the Media Bureau in its Hearing Designation Order for the same proceeding rejected such a "claim because it would effectively exempt all

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<sup>3</sup> See Melinda C. Witmer Hearing Testimony, dated April 27, 2009 at page 4014, MB Docket No. 08-214, File No. CSR-7822-P



MVPDs from program carriage obligations based on the possibility of carriage on other MVPDs.”<sup>4</sup> The Media Bureau went on to state that “...the program carriage provision of the Act prohibits an MVPD from discriminating against an unaffiliated programmer regardless of the competition the MVPD faces,”<sup>5</sup> thus rejecting the contention that discrimination that “reasonably” restrains the ability of a programmer to compete is lawful. The Commission’s elucidation of this important part of the statute and its regulations is needed. Implementing these changes will further establish an effective carriage access complaint process, providing more competition in the programming marketplace, leading to lower programming costs, higher quality programming, faster implementation of advanced services, and more diversity and choices.

Congress, the Commission, and the White House have advocated for more competition and diversity in the programming marketplace. Yet to expect independent programmers, entrepreneurs and the financial community to invest the large sums of money necessary to launch a new cable programming service without addressing fundamental concerns with the carriage access compliant process designed to discourage discriminatory conduct and the lack of a level playing field is unreasonable.

WealthTV urges the Commission to acknowledge that the current state of fair program carriage access in the cable industry is unacceptable and without action the outlook is grim for unaffiliated emerging programmers. For example, Steve Burke, Chief Operating Officer of Comcast Corporation, the nation’s largest cable company, has stated

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<sup>4</sup> Memorandum Opinion and Hearing Designation Order, By the Chief, Media Bureau, dated October 10, 2008, MB Docket No. 08-214, File No. CSR-7709-P, CSR-7822-P, CSR-7829-P, CSR-7907-P, CSR-7876-P, CSR-8001-P, page 12.

<sup>5</sup> Memorandum Opinion and Hearing Designation Order, By the Chief, Media Bureau, dated October 10, 2008, MB Docket No. 08-214, File No. CSR-7709-P, CSR-7822-P, CSR-7829-P, CSR-7907-P, CSR-7876-P, CSR-8001-P, page 12.

that the cable distribution arm of Comcast represents 95 percent of its business and the affiliated programming arm of Comcast represents only about 5 percent of its business. Moving forward, Comcast has established a goal to increase the relative composition of its revenues from this mix to one more canted toward reliance on revenues from its *affiliated* programming arm, raising these revenues from 5 percent of the company's revenues to 35 to 40 percent of the company's revenues, a seven to eight fold increase over the affiliated programming arm's current contribution to company revenues.<sup>6</sup> This dramatic targeted increase in *affiliated* programming by the nation's largest cable company may be achieved by Comcast's raising the prices it charges for its affiliated programming services or the launching of numerous additional Comcast *affiliated* programming networks, or both.

Comcast's stated drive to increase the revenues generated by its affiliated programming raises considerable public policy issues. When a large cable operator carries its own *affiliated* programming network, it sets the price that it charges itself at the wholesale level, and then can pass on the costs to the consumer without any "open marketplace" or oversight protection for the consumer. The small entrepreneurial community that is the engine for truly independent programming, already plagued by a lack of a "level playing field" with respect to carriage access consideration, leading to lack of funding by the investment community, is on the verge of extinction unless the Commission takes immediate and decisive action.

Moreover, the nation's largest cable companies, specifically Comcast, Time Warner, Cox, and Bright House, cooperate and coordinate some of their programming

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<sup>6</sup> See Steve Burke Hearing Testimony, dated April 16, 2009 at pages 1689 – 1690, MB Docket No. 08-214, File No. CSR-7876-P.

carriage decisions via their direct or indirect ownership of iN DEMAND, a wholly owned subsidiary that appears to operate as a buying group or agent for the four companies. Additionally, these cable companies have a history of launching their own “very similar” networks to what is already established in the marketplace by unaffiliated networks.<sup>7</sup> They have tied this programming to other products to sell to unaffiliated MVPDs. These practices may meet the threshold of antitrust violations. Such practices are only expected to continue as Comcast strives to extensively expand its *affiliated* programming business moving forward.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Robert S. Herring", is written over a horizontal line.

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<sup>7</sup> Cox Communication's Robert C. Wilson, SVP of Programming stated in oral testimony that INHD and INHD2 were "...two channels very similar to what HDNet had at the time..." at page 4878. Mr. Wilson further states that "I think what we were really needing at that point in time was content that would be relatively comparable to what HDNet was doing and we thought they (iN DEMAND) could do that..." see Robert C. Wilson Testimony at pages 4882. See April 30, 2009 Testimony, MB Docket No. 08-212, File Nos. CSR-7709-P, CSR-7822-P, CSR-7829-P, and CSR-7907-P.